SOUTHERN RY. CO. v. JACOBS.

March 12, 1914.

[81 S. E. 99.]

1. Commerce (§ 27*)—Railroad Employee—Interstate Commerce.—Where a railroad fireman was employed on a freight train containing cars engaged in interstate commerce, he was so engaged within the protection of the federal Employers' Liability Act (Act April 22, 1908, c. 149, 35 Stat. 65 [U. S. Comp. St. Supp. 1911, p. 1322]), though at the precise moment of his injury he was engaged in shifting cars solely engaged in intrastate commerce in a local freight yard.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 25; Dec. Dig. § 27.*]

2. Master and Servant (§ 286*)—Injuries to Servant—Railroads—Insufficiency of Tract—Negligence.—In an action under the federal Employers' Liability Act (Act April 22, 1908, c. 149, 35 Stat. 65 [U. S. Comp. St. Supp. 1911, p. 1322]), for injuries to a railroad fireman engaged in interstate commerce, as the result of the presence of a cinder pile along the tracks, whether such pile constituted a defect due to the negligence of the railroad company was for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1001, 1006, 1008, 1010-1015, 1017-1033, 1036-1042, 1044, 1046-1050; Dec. Dig. § 286.*]

3. Commerce (§ 8*)—Railroad Employees—Federal Employers' Liability Act—Exclusiveness.—Congress having acted under the commerce clause of the Constitution with reference to injuries to railroad employees engaged in interstate commerce by the passage of the federal Employers' Liability Act (Act April 22, 1908, c. 149, 35 Stat. 65 [U. S. Comp. St. Supp. 1911, p. 1322]), such act supersedes all state laws in the field to which it applies.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 5; Dec. Dig. § 8.*]

4. Master and Servant (§ 203*)—Injuries to Servant—"Assumption of Risk."—The doctrine of assumed risk means that the employee assumes the ordinary risks incident to the business, but not those arising from the neglect of the employer to perform the positive duty owing to the employee with respect to appliances furnished, etc., except that where an employee receives for use a defective appliance, and with knowledge of the defect continues to use it without notice to the employer, he can not recover for an injury resulting

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.

therefrom (citing Words and Phrases, vol. 1, pp. 589, 591; vol. 8, pp. 7584, 7585.)

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 538-543; Dec. Dig. § 203.*]

5. Master and Servant (§ 204*)—Injuries to Servant—Federal Employers' Liability Act—Defenses—Assumed Risk.—Federal Employers' Liability Act (Act April 22, 1908, c. 149, 35 Stat. 66 [U. S. Comp. St. Supp 1911, p. 1323]) § 4, declares that, in any action brought against a carrier under the act for injuries to any of its employees, he shall not be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute for the safety of employees contributed to his injury. Held, that the act did not nullify the defense of assumed risk in actions thereunder, except where violation by the carrier of some statute enacted for the safety of employees contributed to his injury or death.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 544-546; Dec. Dig. § 204.*]

Error to Circuit Court, Brunswick County.

Action by R. B. Jacobs against the Southern Railway Company. Judgment for plaintiff, and defendant brings error. Reversed.

Williams, Tunstall & Thom, of Norfolk, for plaintiff in error.
Buford, Lewis & Peterson, of Lawrenceville, for defendant in error.

KEITH, P. This suit was brought under the act of Congress, approved April 22, 1908, known as the "Employers' Liability Act," to recover of the Southern Railway Company damages for injuries sustained by the plaintiff while in the service of the company as fireman on a freight train running between Lawrenceville and Pinner's Point, Va. There was a verdict and judgment for the plaintiff, to which a writ of error was awarded.

The declaration shows that the defendant was, at the time of the injuries complained of, a common carrier engaged in interstate commerce; that the plaintiff was employee by the defendant in that commerce; and that the railway company permitted a pile of cinders to accumulate alongside its track and roadbed at Lawrenceville, which constituted a defect or insufficiency, due to its negligence, in its track or roadbed, which brings the case within the purview of the first section of the act of Congress above referred to.

Three questions of interest are presented for decision by the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.

record. First. Was the plaintiff in error, at the time of the injury, engaged in commerce between the states, and was the defendant in error a person employed by the plaintiff in error in such commerce, within the purview of the act of Congress? Second. Did the cinder pile alongside the tracks of the company in its yard at Lawrenceville constitute a defect or insufficiency due to its negligence in its track or roadbed, from which the injury to the defendant in error resulted, in whole or in part? Third. Is the plaintiff in error entitled, under the act of Congress, to avail itself of the common-law defense which defeated recovery if the defendant in error was chargeable with actual or constructive knowledge of the negligence of the plaintiff in error in creating the defect or insufficiency in its track or roadbed?

[1] It is true that, at the precise moment of the injury, Jacobs, the man who was injured, was engaged with a crew in shifting cars in the yard at Lawrenceville, and the particular cars which were attached to the engine at the moment of the accident were engaged in intrastate, as contradistinguished from interstate, commerce, and did not come from any point beyond the limits of the state, and were destined to points within the state; but it is also true that the shifting and movement of the cars at the time had for its object the making up of a train to which cars were to be attached which came from points beyond the southern limits of the state and were destined to points beyond the northern limits of the state, by way of Norfolk, and were laden with interstate shipments; and these facts, we think, bring the case fairly with the influence of Pederson *v.* Delaware, Lackawanna & W. R. Co., 229 U. S. 146, 33 Sup. Ct. 648, 57 L. Ed. 1125, and the circuit court committed no error in so deciding.

[2] Nor have we any difficulty in holding that, under the circumstances, the cinder pile alongside the tracks of the company constituted a defect due to the negligence of the company, from which the injury to the appellee resulted, and was a question of fact for the jury upon proper instructions. And this brings us to the interesting and important question, upon the decision of which this controversy must turn.

So much of the act of Congress as is material to our present purpose is as follows:

Section 1 declares that: "Every common carrier by railroad while engaging in commerce between any of the several states or territories, or between any of the states and territories, or between the District of Columbia and any of the states and territories, or between the District of Columbia or any of the states or territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed

by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, * * * then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves or other equipment."

Section 3: "That in all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this act to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: Provided, that no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee."

Section 4: "That in any action brought against any common carrier under or by virtue of any of the provisions of this act to recover damages for injuries to, or the death of, any of its employees, such employee shall not be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee."

[3] It seems to be agreed, and we are of opinion rightly so, that this act was passed by Congress to constitute the law governing the liability of railway companies to their employees; that it was passed by Congress in pursuance of the commerce clause of the Constitution, which clothed it with authority and imposes upon it the duty to regulate commerce with foreign nations, among the several states, and with the Indian tribes. Until a recent period Congress had not carried this power into execution, but it had been left to the control of the several states through their Legislatures and courts. When Congress, however, did act upon the subject, its authority was complete and exclusive.

To the act, then, we must look for the law governing the liability of railroads and their employees inter sese, and in order to determine their relative privileges, duties, and obligations. It in itself and of itself constitutes the sole and supreme law as

to the subjects upon which it touches, and is not to be pieced out by reference to state legislation.

In Mich. Cent. R. Co. *v.* Vreeland, 227 U. S. 59, 33 Sup. Ct. 192, 57 L. Ed. 417, Mr. Justice Lurton, speaking for the Supreme Court, said: "By this act Congress has undertaken to cover the subject of the liability of railroad companies to their employees injured while engaged in interstate commerce. This exertion of a power which is granted in express terms must supersede all legislation over the same subject by the states." And speaking with reference to the police power of the state, the opinion, continuing, says: "No urgency for its use can authorize a state to exercise it in regard to a subject-matter which had been confided exclusively to the discretion of Congress by the Constitution. * * * It therefore follows that, in respect of state legislation prescribing the liability of such carriers for injuries to their employees while engaged in interstate commerce, this act is paramount and exclusive, and must remain so until Congress shall again remit the subject to the reserved police power of the states."

Indeed, counsel for defendant in error, in his brief, states the law upon the subject with propriety. "The act of Congress provides a complete system of liability, which, since the amendment of 1910 (Act April 5, 1910, c. 143, 36 Stat. 291 [U. S. Comp. St. Supp. 1911, p. 1324]), does not need to be pieced out, and, indeed, cannot be pieced out by resorting to the local statutes of the state of procedure, or that of the injury. The act is one which relates to the liability of railroad companies engaged in interstate commerce to their employees while engaged in such commerce. The power of Congress to deal with the subject comes from its power to regulate commerce between the states, and, when exercised, is exclusive of the law of the states."

The field having been occupied by Congress by the passage of the law which we have quoted, and the law which it has passed being exclusive of all others, it only remains to ascertain whether or not, in the record before us, the judgment complained of has been reached in obedience to and conformity with the provisions of that law.

The objection to the first instruction given by the court at the instance of the plaintiff is not, we think, well taken. It states the law correctly, and there was evidence to support it.

The second instruction given by the court over the objection of the railway company is as follows: "The court further instructs the jury that knowledge by the plaintiff of the unsafe character or condition of the said roadway is of itself no defense to an action for injury caused to him thereby. Such knowledge, however, if the jury believe from the evidence that he had such knowledge, may be considered by the jury along with all the

evidence in the case in determining whether the plaintiff was himself guilty of negligence, which contributed to produce the injury mentioned in the declaration; but the fact that the plaintiff may himself have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of contributory negligence, if such there were, which they may believe from the evidence was attributable to said plaintiff under the circumstances."

Instruction A asked for by the plaintiff in error and refused by the court is as follows: "The court instructs the jury that if they believe from the evidence that the existence of the cinder pile was known to the plaintiff, or that he had been working on the Southern Railway at Lawrenceville for more than a year, and that the cinders had been piled at the same place in the way described by the witnesses for many years prior to the accident, and that the plaintiff had failed to show that he had made complaint or objection on account of the cinder pile, then he assumed the risk of danger from the cinder pile, if there was any danger in it, and the act of Congress approved April 22, 1908, permits this defense, and the jury should find their verdict for the defendant."

The contention of plaintiff in error is that the court erred in giving instruction No. 2, as above set forth, and in refusing to give the instruction marked "A," as requested by it.

Instruction No. 2 deals with two propositions: First, the doctrine of assumed risk; and, secondly, with that of contributory negligence. With respect to the latter subject, the instruction seems to be in accordance with section 3 of the Employers' Liability Act, which declares that, although the employee may have been guilty of contributory negligence, that fact shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee.

The objection urged to the instruction is to the first clause of it, which tells the jury that knowledge by the plaintiff of the unsafe character or condition of the roadway is of itself no defense to an action for injury caused thereby.

Under the Virginia law, the instruction in this respect would be free from objection, for our Constitution, adopted in 1902, declares that "knowledge, by any such railroad employee injured, of the defective or unsafe character or condition of any machinery, ways, appliances or structures, shall be no defense to an action for injury caused thereby" (Const. 1902, § 162 [Code 1904, p. ccix]), which wholly destroys the defense of assumed risk as applied to railroad employees. The language of the act of Congress is far otherwise. Section 4 declares:

"That in any action brought against any common carrier under or by virtue of any of the provisions of this act to recover damages for injuries to, or the death of, any of its employees, such employee shall not be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee."

The contention of defendant in error is that the risks assumed in contemplation of this act are such as are inherent to the work in which the employee is engaged, and such as cannot be foreseen and prevented by the exercise of ordinary care upon the part of the employee; that it was not intended to embrace such risks as flow from any negligent act on the part of the employer, or of any of its officers, agents, or employees, or by reason of any defect or insufficiency due to its negligence in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment; but that as to such acts of negligence the employer is under an absolute liability by force of the first section of the act, and in support of this contention relies in part upon the precise form of the term used in the act, which does not speak of "assumption of risks," but uses the phrase, the "employee shall not be held to have assumed the risks." But this change, merely in the order of the words used, cannot have any important bearing, we think, on the construction of the statute; "assumption of risks," and "assumed the risks," of his employment being equivocal modes of stating an identical proposition. It is a phrase which has acquired a definite technical meaning, nowhere more vigorously enforced than in the decisions of the Supreme Court of the United States.

[4] In Texas Pacific R. Co. *v.* Archibald, 170 U. S. 665, 18 Sup. Ct. 777, 42 L. Ed. 1188, the Supreme Court said: "The elementary rule is that it is the duty of the employer to furnish appliances free from defects discoverable by the exercise of ordinary care, and that the employee has a right to rely upon this duty being performed, and that, whilst in entering the employment he assumes the ordinary risks incident to the business, he does not assume the risk arising from the neglect of the employer to perform the positive duty owing to the employee with respect to appliances furnished. An exception to this general rule is well established, which holds that where an employee receives for use a defective appliance, and with knowledge of the defect continues to use it without notice to the employer, he cannot recover for an injury resulting from the defective appliance thus voluntarily and negligently used."

In Words and Phrases, under the title "Assumption of Risk," many authorities are collated, all of which confirm the doctrine

as stated in the case just cited. It is a doctrine wholly distinguishable from that of contributory negligence, which is a breach of legal duty imposed by law upon the servant, however unwilling or protesting he may be, and differs from the assumption of risk which is not a duty but merely voluntary upon the part of the servant. Dempsey *v.* Sawyer, 95 Me. 295, 49 Atl. 1035.

[5]In Schlemmer *v.* Buffalo, R. & P. Ry. Co., 205 U. S. 1, 27 Sup. Ct. 407, 51 L. Ed. 681, dealing with the subject of assumption of risk, it is said: "Whether an actual assumption by contract was supposed on grounds of economic theory, or the assumption was imputed because of a conception of justice and convenience, does not matter for the present purpose. * * * But, at the present time, the notion is not confined to risks of such negligence (that is to say, negligence necessarily incident to the employment). It is extended, as in this statute it plainly is extended, to dangerous conditions, as of machinery, premises, and the like, which the injured party understood and appreciated when he submitted his person to them. In this class of cases the risk is said to be assumed because a person who freely and voluntarily encounters it has only himself to thank if harm comes, on a general principle of our law."

It is true that the employee does not assume the risk of negligence upon the part of his employer. This court so held in Black *v.* Va. Portland Cement Co., 104 Va. 450, 51 S. E. 831, where it was said that "failure upon the part of the master to observe, for the protection of his servant, that reasonable degree of care which the circumstances of the particular case justly demand is actionable negligence, and is not within the influence of the doctrine of assumed risks.' That case arose upon a demurrer to the declaration, which stated that the plaintiff was in the employment of the defendant, who was engaged in quarrying rock; that the defendant, whose duty it was to keep its quarry in a reasonably safe condition, knowingly permitted a stone to remain in a position from which it was liable to fall at any time, and that it did fall, on a day stated, upon the plaintiff, who was ignorant of the danger, and in the exercise of due and proper care and caution, by reason of which the injury complained of was inflicted. The demurrer to the declaration was overruled, and in the course of the opinion the court said: "Every fact here stated is upon demurrer to be taken as true—that the rock which inflicted the injury was in a position from which it was liable to fall; that the master knew this fact, and negligently permitted it to remain; and that the servant, ignorant of the situation, remained at work in the quarry in the due course of his employment, and, while in the performance of his duty, received the fatal injury. The exact point of the decision be-

ing that the danger was known to the master and not known by or communicated to the employee.

Cases might be multiplied to any extent to show that the doctrine of assumed risks covers more than those risks which are ordinarily incident to the business, and embraces the use of defective appliances and work of almost every description where the employee with knowledge of the defect, continues to use it without notice to the employer.

Upon this point see Choctaw & Gulf Ry. Co. *v.* McDade, 191 U. S. 54, 24 Sup. Ct. 24, 48 L. Ed. 96, where it is said that: "An employee assumes the risk of injury from defective appliances furnished by his employer only when the defect is known to, or plainly observable by, the employee."

When, in section 3, Congress deals with contributory negligence, it forbids that defense wholly in cases where the common carrier has violated a statute enacted for the safety of its employees, and such violation contributed to the injury or death of the employee. The same idea runs through section 4, and the doctrine of assumed risks is wholly excluded where the danger arose from the violation by the common carrier of a statute enacted for the safety of the employee. The language employed is plain and easy to be understood, and leaves, we think, except in the particular mentioned, the defense of assumption of risks in full force and vigor. The subject has been considered in numerous cases.

In Freeman *v.* Powell (Tex. Civ. App.) 144 S. W. 1033, an employee of an intrastate railroad company, engaged in preparing ice for use in passenger cars carrying interstate passengers, was engaged in interstate commerce; and hence the company's liability to him for personal injuries received in the work is governed by the act of Commerce approved April 22, 1908, under which the assumption of risk is available, unless the injury was caused by the employer's violation of a statute enacted for the safety of employees. In that case the trial court found that the employee did not assume the risk arising from the failure to furnish certain needed appliances, but the appellate court was of opinion that, in the absence of a statute affecting the question, the employee, under the facts of the case, had assumed the risk. It is insisted, however, said the appellate court, that the (trial) court's conclusion to the contrary is correct, because of the act of the Legislature of the state of Texas, which forbids the plea of assumed risks in certain cases. "If," said the court, "the above act applies, the findings of the trial court have some support in the evidence; but we are of the opinion that the rights of the parties are to be determined by the provisions of the act of April 22, 1908, passed by the Congress of the United States."

And section 4 is referred to, which we have already copied in this opinion. The Texas court, referring to that section, said as follows: "It thus appears that under the federal statute a complaining employee, to whom the act applies, is not relieved from the operation of the ordinary rule of assumed risk, except in cases where there is a violation by the carrier of some statute enacted for the safety of an employee which has contributed to his injury or death, and of this there is no contention in this suit. In the respect just noted, the act of Congress conflicts with the state's statute which we have quoted. The power of Congress over interstate commerce is not an open question, and it extends to all agencies and instrumentalities by or through which it is carried on."

The point of resemblance between this case and the case before us will at once be observed. In both cases the state gave exemption from the operation of the doctrine of assumed risks in language which permitted a wider scope than that of the act of Congress upon the same subject.

In Bowers *v.* Southern Ry. Co., 10 Ga. App. 367, 73 S. E. 677, it was held that: "The servant may assume the risk as in other employments, except as to such things as are violative of statutes enacted for the securing of the servant's safety."

In Barker *v.* Kansas City M. & O. Ry. Co., 88 Kan. 767, 129 Pac. 1151, 43 L. R. A. (N. S.) 1121, the Supreme Court of Kansas held that the "assumption of risk is a good defense to an action under this act, except when the violation by the carrier of some statute enacted for the safety of employees has contributed to the injury or death of the employee. And, when such defense is pleaded and supported by the evidence, it is the duty of the court to instruct thereon."

In Central Vermont Ry. Co. *v.* Bethune, 206 Fed. 868, 124 C. C. A. 528, where section 4 of the Employers' Liability Act was construed, it was held that the section "limited the abrogation of the doctrine of assumed risk in such cases to instances where the violation of an express statutory duty by the carrier was charged, and hence such doctrine was applicable to an action under the statute for the death of a railroad employee engaged in interstate commerce resulting from the alleged negligence of the railroad company in constructing its tracks too close together."

In Gulf, Colorado, etc., Ry. Co. *v.* McGinnis, 228 U. S. 173, 33 Sup. Ct. 426, 57 L. Ed. 785, the principal question before the court seems to have been as to the persons who could claim the benefit of the federal Employers' Liability Act; but in the course of its opinion the court said: "It has also been assigned as error that the defense of assumed risk was, in legal effect, denied,

because the court overruled a motion to instruct a verdict for the defendant. The defense of assumed risk was submitted to the jury under a full and fair general charge."

In Mondou *v.* N. Y., N. H. & H. R. Co., 223 U. S. 1, 32 Sup. Ct. 169, 56 L. Ed. 327, 38 L. R. A. (N. S.) 44, the opinion delivered by Mr. Justice Van Dovanter and concurred in by the entire court is most instructive as to many features of the case under consideration. He enumerates the departures from the common law made by portions of the act, and, when he comes to that rule that involves the assumption of risks, he says: "The rule that an employee was deemed to assume the risk of injury, even if due to the employer's negligence, where the employee voluntarily entered or remained in the service with an actual or presumed knowledge of the conditions out of which the risk arose, is abrogated in all instances where the employer's violation of a statute enacted for the safety of his employees contributed to the injury." In the course of his opinion he says: "True, prior to the present act, the laws of the several states were regarded as determinative of the liability of employers engaged in interstate commerce for injuries received by their employees while engaged in such commerce. But that was because Congress, although empowered to regulate that subject, had not acted thereon, and because the subject is one which falls within the police power of the states in the absence of action by Congress."

In Seaboard Air Line Railway *v.* Moore, 228 U. S. 433, 33 Sup. Ct. 580, 57 L. Ed. 907, in an opinion of the court by the Chief Justice, it is said: "It is pressed upon our attention that the court decided and erred in deciding that the Employers' Liability Law abolished, as to all cases coming under its provisions the defense of assumption of risk, and also that a railroad employee injured in the course of his employment could avail of the benefits of the statute, although at the time he sustained the injury he was not actually engaged in interstate commerce. But we think it is plain that the contentions last stated are without merit, and that the only even pretext afforded for their assertion arises from a misconception of the opinion below, which we think, despite its meager and maybe inadequate examination of the case, nevertheless on its face rebuts the inferences which the contentions attempt to draw from it. It is unnecessary to recur to the text of the opinion to demonstrate the conclusion just stated, because, in any event, the contentions must be overruled, since the benefit of the defense of assumption of risk was accorded to the railway company at the trial, and the right of the plaintiff to recover was made dependent upon his establishing that at the

time he was injured he was actually engaged in interstate commerce."

Upon the whole case, we are of opinion that the court erred in giving instruction No. 2, as asked for by the defendant in error, and in refusing to give instruction A, asked for by plaintiff in error. We think that the decisions to which we have referred, and especially those of the Supreme Court of the United States, show very plainly that the fourth section of the Employers' Liability Act does not wholly do away with the defense of assumption of risk, but that it still constitutes a defense, except in those cases where the violation by the common carrier of some statute enacted for the safety of the employee contributed to his injury or death.

What the future may bring forth as to the true exposition of the statute remains in the breast of the gods; we can only deal with their recorded utterances.

The judgment must therefore be reversed, the verdict of the jury set aside, and the cause remanded for a new trial.

Reversed.

CARDWELL, J., absent.

Note.

All cases interpreting the Federal Employers' Liability Act are of interest at this time. The rule laid down in the principal case that the enactment by congress, under its constitutional authority, of an Employers' Liability Act supersedes all state constitutions or statutes in cases to which it applies, has been unformly adopted by the courts called upon to pass on that point since the passage of the act. As stated in Richey on the Federal Employers' Liability Act, p. 41: "This section is controlling with respect to any different or contrary state rule, in cases in which the Federal Act applies, whether such state rule be common law or statutory." Just how far the act goes in abolishing the doctrine of assumed risk is not so clear, but the courts agree that the act does abolish this doctrine in so far as it applies to cases where the violation of a statute passed for the benefit of the employee contributed to the injury. The decisions are not uniform, however, where the negligence causing the injury is not a violation of a statute. The majority of the cases hold that the doctrine remains as it was under the common law or as modified by statutory enactment except as provided in § 4 of the act, and this seems to be a better ruling. In addition to the cases cited to this point in the principal case, see, also, Charleston, etc., R. Co. *v.* Brown (Ga. App.), 79 S. E. 932; Missouri, etc., R. Co. *v.* Scott (Tex. Civ. App.), 160 S. W. 432; Neil *v.* Idaho, etc., Railroad, 22 Idaho 74, 125 Pac. 331. In the last case it was said: "Under the provisions of § 4 of said act, it is provided that the employee shall not be held to assume the risk of his employment in any case where the violation by such common carrier of any statute enacted for the safety of the employees contributed to the death or injury of such employee, and, as it is not claimed in this case that the company had

violated any statute enacted for the safety of employees, the defense of assumption of risk remains as at the common law."

Undoubtedly the act abrogates the defense of assumed risk in cases of violation of statutes passed for employees' benefit, but the decisions are not uniform in holding that the defense is retained in other cases because expressly repudiated in the case where the statute is violated. In Wright *v.* Yazoo, etc., R. Co., 197 Fed. 94, the court said: "It is conceded that the common-law rule that contributory negligence barred the right of recovery has been abolished by the act. Shall the courts destroy the effect of the act in this particular by holding that common carriers are not liable to their servants for injury or death inflicted as a result of the negligence of their officers, agents, or employees, upon the ground that the servant assumes the risk incident to the negligence of the officers, agents, or employees of the carrier? In view of the first section of the act, which provides that such common carrier shall be liable in damages to its employee, resulting in whole or in part from the negligence of any of its officers, agents, or employees, it is not permissible, in my judgment, to hold that the employee assumes the risk of his employment, which arises from the negligence of the officers, agents, or employees of the carrier. It is insisted that since the act provides that he shall not be held to have assumed such risk in cases only where the violation by the common carrier of any statute enacted for the safety of employees contributed to the injury, the maxim, expressio unius est exclusio alterius, applies. I do not think this insistence is sound, or that it should be sustained." See, also, Philadelphia, etc., R. Co. *v.* Tucker, 35 App. D. C. 123; Southern R. Co. *v.* Howerton (Ind. App.), 101 N. E. 121.

The term statute, as used in the fourth section of the act, has been construed to mean federal statute. Horton *v.* Seaboard Air Line R. Co., 162 N. C. 424, 78 S. E. 494.